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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ROSIE LEE WILSON, Defendant and Appellant.	B284691 (Los Angeles County Super. Ct. No. MA064056)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed.

Mark R. Feeser, under appointment by the Court of Appeal, for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Yun Lee and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

We are presented with a tragic case involving the death of two-year-old Anthony Wilson at the hands of Brandon Williams, co-defendant of appellant Rosie Wilson. Rosie Wilson is Anthony's mother. On the night of the fatal beating, Wilson noticed Anthony's injuries but did not take him to the hospital until the following afternoon. Anthony was on life support for 45 days before passing away. Testimony from medical experts strongly suggested he may have survived had he been brought in on the night of his injuries.

Wilson was convicted of second degree murder and felony child abuse. As to the murder charge, the jury was instructed on two theories: natural and probable consequences and aiding and abetting. Wilson argues on appeal that her second degree murder conviction must be reversed because: (1) it was error for the trial court to instruct the jury on the natural and probable consequences doctrine as applied to criminally negligent child endangerment; (2) the trial court abused its discretion in allowing the jury to hear evidence of Wilson's prior acts of child neglect; and (3) the trial court abused its discretion in refusing to allow the jury to hear a recording of Williams's confession to Wilson and her immediate reaction to that confession. Wilson also urges this court to vacate her second degree murder conviction in light of Senate Bill No. 1437, which eliminated the natural and probable consequences doctrine as a valid legal theory in support of a murder charge. Finally, she alleges she is entitled to a remand for the limited purpose of conducting a *Franklin*[1] hearing in the event we affirm her second degree

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1 *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).

murder conviction. Wilson does not challenge her felony child abuse conviction.

We conclude there was no instructional error; the trial court abused its discretion in allowing one prior incident of child neglect into evidence, but the error was harmless; the trial court did not abuse its discretion in refusing to allow the jury to hear a recording of Williams's confession; we are not the appropriate court to address whether she is entitled to relief under Senate Bill No. 1437; and Wilson is not entitled to a remand for a *Franklin* hearing.

Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Rosie Wilson was born on October 6, 1993. She attended special education classes as a child and did not finish high school. Wilson's daughter, Gracey, was born in 2010, when Wilson was 17 years old. Her son Anthony was born in 2012, when appellant was 18 years old.

In the spring of 2014, Wilson and her children moved into the home of Colleen Brydie. Also living in Brydie's home were Brydie's son, husband, and two other relatives. In the summer of 2014, Wilson met codefendant Brandon Williams. He moved into the Brydie home shortly after they met. According to Brydie, things between Wilson and Williams seemed "okay" when Williams first moved in, but later Williams began screaming and cursing at Wilson and yelling at the children as well. Wilson began to act as through she feared him. At one point, Brydie noticed a bruise on Wilson's chest; Wilson told Brydie that Brandon had hit her.

Brydie had also seen bruises on Anthony. At one point, Brydie noticed Anthony seemed hurt and sore. Wilson escorted Anthony through the house to see if he feared anyone. He cried in the presence of two people: Williams and a male relative of Brydie's. Wilson also took photographs of some of Anthony's injuries with her cell phone. Despite her son's discomfort, Wilson did not take Anthony to the hospital because her children had just returned to her care after being removed by the Department of Children and Family Services (DCFS).

On the night of August 21, 2014, Wilson went to a karaoke bar with the Brydies. Williams stayed home with Anthony and Gracey. When Wilson returned at 11:00 pm, Anthony was barely conscious. Wilson did not take him to the hospital. The following morning, Anthony was not responding and was in a "seizure position." Williams and Wilson took Anthony to the hospital, arriving at Palmdale Regional Hospital at 1:14 pm.

A. Hospital Admission and Treatment

Medical staff testified Anthony was unconscious and seizing when he arrived at the hospital, which suggested he suffered a severe head injury. He had multiple bruises, including to his buttocks, rectum, and scrotum, which were caked with baby powder. X-rays revealed fractures to one of Anthony's ribs and his left clavicle. Callous bone was forming on the fractures, an indication they were old injuries. The x-rays also showed one of Anthony's teeth was in his abdomen. Dr. Otieno, one of the treating physicians, observed multiple bruises on Anthony's head, face, back, buttocks, genitals, and abdomen. Some of the bruises were fresh and some were older. The bruising to Anthony's abdomen indicated his internal organs were injured. A CT scan revealed massive intracranial bleeding.

Dr. Otieno testified he was 100 percent certain Anthony's injuries were the result of child abuse. He also opined that if Anthony had been brought to the hospital earlier, his prognosis would have been far better.

Anthony's neurosurgeon testified Anthony had dilated pupils, indicating his brain stem was no longer controlling his eyes. Anthony was also "posturing" with his arms extended and his back arched, a defense mechanism resulting from a devastating injury. Anthony had a large hematoma on the right side of his head which was cutting off the blood supply to his brain. His brain was swelling. The neurosurgeon testified Anthony's brain injury was consistent with major trauma, not a slip and fall.

Anthony was treated at Children's Hospital for 45 days and received palliative care until he died on October 5, 2014. The parties stipulated the coroner had concluded Anthony's cause of death was "a sequelae of traumatic injuries, primarily a head injury, but with a contributing role from multiple fractures" and his death was a homicide. The parties also stipulated a forensic neuropathology consultant determined he had suffered from severe blunt force head trauma; a large, acute right subdural hemorrhage; brain swelling; hypoxic ischemic brain injury; bilateral chronic subdural neomembrane; and a large external stem herniation of the right cerebrum. Finally, the parties stipulated an ophthalmic pathologist determined Anthony suffered a chronic subdural hemorrhage to the right eye.

A physician specializing in child abuse pediatrics testified fractures to Anthony's clavicle and rib occurred seven to 14 days before he was brought to the hospital, and a fracture to his radius had occurred 14 to 21 days before. She testified his traumatic

brain injury and a fracture to his tibia occurred within days of being brought to the hospital. The doctor opined Anthony's injuries were not accidental and had he been taken to the hospital immediately, he would have had a better chance of survival.

B. Gracey's Condition on August 22, 2014

When Anthony was brought to Palmdale Hospital, a social worker examined his three-year-old sister, Gracey. The social worker noticed Gracey was dirty and disheveled. She had trouble walking and was nonverbal. The social worker ordered a forensic exam. During the exam, Gracey was withdrawn and timid. She would stare for long periods of time and was very jumpy. Gracey had numerous abrasions on her head, chest, back, forehead, neck, knee, thigh, ear, abdomen, and arm. Her underwear was soiled and her feet were very dirty. Gracey was immediately placed in foster care.

C. Wilson's Statements to Law Enforcement at the Hospital

Detective Susan Velasquez interviewed Wilson multiple times at the hospital. In the first interview, Wilson said she was grocery shopping at Walmart the previous night when she received a call from Williams telling her Anthony had fallen. When she returned home, Anthony seemed fine. Wilson told Velasquez Anthony was awake and said hi to her. She and Williams gave Anthony two cold baths and put him to sleep around 10:40 pm after Anthony said he wanted to go "night." Wilson said she did not notice any injuries or bruising on Anthony's body that night.

Wilson told Velasquez she stayed up watching Anthony and noticed the next morning that he was in a "seizure position" and had bruises on the back of his head and his legs. She stated she never noticed any bruises on Anthony's buttocks or that he was missing teeth. When Velasquez showed Wilson photographs of Anthony's buttocks and said the bruises could not have been caused by a fall, Wilson stated Gracey may have caused them. Wilson also told Velasquez this was the first time Anthony had fallen, Williams did not have a temper, and Williams never got frustrated with the children.

After the first interview with Wilson, Velasquez interviewed Williams. At the end of the interview, Velasquez brought Wilson into the room so that Wilson would know "the truth had come out already." Upon hearing from Williams that he had caused Anthony's injuries, Wilson yelled at Williams and cried. Velasquez could not tell whether Wilson was upset because the truth came out and she was scared for herself, or for other reasons.

Detective Velasquez interviewed Wilson again in the presence of Wilson's sisters, mother, and Detective Laura Brunner. Velasquez and Wilson informed them Williams had confessed to punching Anthony five times in the head because he would not stop crying. The detectives showed Wilson photographs of Anthony's injuries. Wilson's sister and mother said they did not believe Wilson would not have noticed the bruises on Anthony's buttocks if she had changed his diaper. Wilson admitted noticing Anthony had a fat lip, but stated Williams had told her Anthony bit his lip. Wilson replied she wiped him "from the bottom" so she did not see the bruises.

Wilson's family urged Wilson to tell the truth. Wilson denied she was covering for Williams.

Wilson's sister told Wilson she had spoken to Williams's mother and knew Anthony was unconscious when Wilson returned home the previous night. Wilson denied Anthony was unconscious and repeated he said "hi mom." She admitted Williams told her he had performed CPR on Anthony before she got home.

Wilson eventually admitted she noticed bruises on Anthony's bottom that morning. She stated she had asked Williams if anybody hit Anthony, and Williams told her Anthony fell by the pool. Wilson said Williams told her not to take Anthony to the hospital because the staff would think she had injured him. Williams also told Wilson he would blame Anthony's injuries on her, if he was asked about them.

D. Subsequent Investigation and Interviews

When Wilson returned home that night, she told Brydie not to tell police she was at karaoke the night before.

Detective Velasquez went to the Brydie home that night to speak to witnesses. Brydie told Velasquez Anthony had been limping for the past two weeks. Wilson was arrested at approximately 1:16 a.m. on August 23, 2014.

Two days later, on August 25, 2014, Wilson was interviewed by a social worker at the Palmdale Sheriff's Station. Wilson admitted she was at a karaoke bar on the night of August 21 and Anthony was whimpering when she gave him a bath. Otherwise, Wilson repeated her previous statements about Anthony's behavior and injuries.

Detective Velasquez also interviewed Wilson again on August 26, 2014. Wilson waived her Miranda rights and admitted she noticed bruising on Anthony's buttocks three weeks earlier. Williams told her Anthony had fallen by the pool. Afterwards, Anthony did not want to walk much; all he wanted to do was lay down in the living room. He did not want to eat for a few days and was not using his left arm. She did not take him to the doctor because she had prior cases with DCFS and thought she could take care of him herself. Wilson admitted she covered up Anthony's bruises with makeup and baby powder before taking him to the hospital on August 22, 2014. Wilson also admitted lying about going to Walmart instead of karaoke because she did not want to appear neglectful leaving Anthony with someone who hurt him. Wilson nevertheless denied she was trying to protect Williams, but admitted her son did not say "hi mom" when she returned home on August 21, 2014.

E. Charges, Conviction, and Sentence

On April 28, 2017, Wilson was charged by second amended information with one count of murder (Pen. Code, § 187, subd. (a)) and one count of felony child abuse (§ 273a, subd. (a)).[2] The amended information also alleged Wilson had willfully caused or permitted a child to suffer unjustifiable physical pain and injury leading to death, a violation of section 12022.95.

At trial the People argued Wilson could be convicted of second degree murder on two alternative theories: aiding and abetting, or natural and probable consequences. The first theory required the jury to convict if it found she knew Williams

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

intended to commit murder and she intended to aid and abet him in that murder. The second theory required the jury to convict if it found a person in Wilson's position would have known murder was a natural and probable consequence of the child abuse perpetrated by Williams.

On May 30, 2017, a jury convicted Wilson of second degree murder and felony child abuse, and found true the allegation pursuant to section 12022.95. On August 21, 2017, on the murder count, the trial court sentenced Wilson to 15 years to life in prison. Pursuant to section 654, the court stayed a 10-year combined sentence for felony child abuse and the section 12022.95 allegation.

DISCUSSION

Wilson timely appealed and raises three issues in her opening brief: (1) it was error for the trial court to instruct the jury on the natural and probable consequences doctrine as applied to criminally negligent child endangerment; (2) the trial court abused its discretion in allowing the jury to hear evidence of Wilson's prior acts of child neglect; and (3) the trial court abused its discretion in refusing to allow the jury to hear a recording of Williams's confession to Wilson and her immediate reaction to that confession.

During the pendency of her appeal, Wilson, with leave of court, filed supplemental briefs arguing she is entitled to a remand for a *Franklin* hearing in the event we affirm her second degree murder conviction, and that her second degree murder conviction must be reversed in light of Senate Bill No. 1437. As to both issues, we invited the Attorney General to file supplemental respondent's briefs and Wilson to file supplemental reply briefs.

A. The Trial Court Did Not Err by Instructing the Jury on the Natural and Probable Consequences Doctrine as Applied to Criminally Negligent Child Abuse

"In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement." (*Middleton v. McNeil* (2004) 541 U.S. 433, 437; *People v. Mills* (2012) 55 Cal.4th 663, 677.) "A single jury instruction may not be judged in isolation, but must be viewed in the context of all instructions given." (*People v. Thomas* (2011) 52 Cal.4th 336, 356.) "If the charge as a whole is ambiguous," we must determine whether there is a reasonable likelihood the jury applied the challenged instruction in a way that violated the Constitution. (*Middleton v. McNeil*, at p. 437; *People v. Huggins* (2006) 38 Cal.4th 175, 192.) We review de novo whether instructions given to a jury correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

Wilson contends her second degree murder conviction must be reversed because the trial court's instruction permitted the jury to convict her on the invalid legal theory of aiding and abetting the offense of criminally negligent child endangerment, with murder as the natural and probable consequence. We find no error.

In pertinent part, the trial court gave the jury instructions on general principles of aiding and abetting (CALCRIM No. 400); direct aiding and abetting an intended crime (CALCRIM No. 401); the natural and probable consequences doctrine (CALCRIM No. 402); first or second degree murder with malice aforethought (CALCRIM No. 520); involuntary manslaughter (CALCRIM No. 580); and criminally negligent child abuse likely to produce great bodily harm or death under section 273a

(CALCRIM No. 821). The instruction on natural and probable consequences identified the target offense as criminally negligent child abuse, and read as follows:

> "The defendant is charged in Count 4 with child abuse in violation of [P]enal [C]ode section 273(a) and in Count 1 with murder in violation of [P]enal [C]ode section 187(a).
>
> "You must first decide whether the defendant is guilty of child abuse in violation of [P]enal [C]ode section 273(a). If you find the defendant is guilty of this crime, you must then decide whether (she) is guilty of murder in violation of [P]enal [C]ode section 187(a).
>
> "Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.
>
> "To prove that the defendant is guilty of murder under a theory of aiding and abetting and natural and probable consequences, the People must prove that:
>
> "1. The defendant is guilty of child abuse;
> "2. During the commission of the child abuse, a co-participant in that child abuse *committed* the crime of murder;
> "AND
> "3 Under all of the circumstances, a reasonable person in the defendant's

> position would have known that the commission of murder was a natural and probable consequence of the commission of the child abuse.
>
> "A *coparticipant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.
>
> "A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.
>
> "To decide whether the crime of murder was committed, please refer to the separate instructions that I will give you on that crime."

Based on the instructions, the jury was tasked with deciding whether Wilson and Williams aided and abetted each other in criminally negligent child abuse; whether Wilson was guilty of criminally negligent child abuse; whether Williams murdered Anthony over the course of the child abuse; and whether a reasonable person in Wilson's position would have known that murder was a natural and probable consequence of the abuse. Wilson makes a number of arguments to support her contention that the natural and probable consequences doctrine, as applied to criminally negligent child abuse, was invalid in her case.

Wilson asserts that her liability for child abuse "was complete" when she left Anthony in Williams's care the second

time because "her liability was premised on leaving Anthony with a man who had abused him in the past." Therefore, she argues, she cannot be liable for second degree murder under an aiding and abetting theory because she and Williams would both have to have shared an intent to act negligently by leaving Anthony in Williams's own care. Respondent concedes that it would be nonsensical for Williams to have committed the target offense of criminally negligent child endangerment by leaving Anthony in his own care, and further contends that the jury therefore could not have applied an aiding and abetting theory to the specific act of leaving Anthony in Williams's care a second time. Respondent contends that the target offense was negligent child endangerment based on the act of Wilson and Williams failing to take Anthony to the hospital in a timely manner.

Viewing the jury instructions as a whole, we conclude Respondent's analysis is far more plausible. This is particularly so because the court provided the jury with an unanimity instruction (CALCRIM No. 3500) specifying that Wilson was charged with child abuse sometime during the period of June 1, 2014 to October 5, 2014. The instruction specified the People presented evidence of multiple acts to prove that Wilson was guilty of child abuse, and the jury must not find her guilty "unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act [she] committed." Wilson has presented no evidence that the jury relied only on Wilson's act of leaving Anthony with Williams to the exclusion of her failure to take Anthony to the hospital in a timely manner.

Wilson also argues that she cannot be liable for second degree murder under the natural and probable consequences doctrine because Wilson was charged with and found guilty of criminally negligent child endangerment whereas Williams was charged with and convicted of intentional child abuse. Because they were each charged with different acts of abuse, with different mens rea requirements, Wilson asserts, she and Williams did not share the same intent.

It is of no consequence, however, that Williams was charged and convicted of intentional child abuse whereas Wilson was charged and convicted of negligent child abuse. The natural and probable consequence doctrine can be based on an uncharged crime. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 266–267 [when uncharged target offense forms basis for criminal liability under natural and probable consequences doctrine, court must identify and describe uncharged offense for jury].) The jury instructions clearly identified criminally negligent child abuse as the target crime. The jury had to find that both Williams and Wilson acted negligently, and Wilson cannot demonstrate that the jury did *not* determine that Williams was also negligent by failing to take Anthony to the hospital or by committing other negligent acts.

Wilson further argues it was a logical impossibility for her to have aided and abetted Williams in an offense that neither Williams nor Wilson consciously intended to commit. As such, she argues, there could not have been a union of intent between Wilson and Williams to commit criminally negligent child abuse. We disagree. Anthony was unconscious when Wilson returned home. Williams told her he performed CPR on the child. Anthony had bruises all over his body. Williams told Wilson not

to take him to the hospital because medical staff would think she abused Anthony and he would affirmatively blame the injuries on her. She obeyed him and kept Anthony home until the following afternoon. Furthermore, before taking Anthony to the hospital, she attempted to cover his bruises. These words and actions by both Wilson and Williams—and Wilson's failure to act when she had a duty to protect her child—are negligent acts that they committed and facilitated together.

The aiding and abetting instruction given to the jury stated that the People must prove that: (1) The perpetrator committed the crime; (2) the defendant knew that the perpetrator intended to commit the crime; (3) before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and (4) the defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. Thus, in following the aiding and abetting instructions, the jury could have reasonably concluded that Williams was criminally negligent by keeping Anthony home despite his severe injuries, Wilson knew Williams intended to keep the child home as well, Wilson aided and abetted Williams by not taking Anthony to the hospital herself, and failing to take him in and covering his injuries did in fact aid and abet Williams's negligence.

Upon finding true these elements of aiding and abetting the target crime of negligent child abuse, it is reasonably likely the jury found true the elements of the natural and probable consequences doctrine. First, the jury found Wilson guilty of criminally negligent child abuse. The jury then had to determine whether, over the course of her negligence, Williams committed murder; and whether a reasonable person in Wilson's position would have known that murder was a natural and probable

consequence of her criminal negligence. With respect to the second element, the jury heard evidence Williams abused Anthony weeks earlier and Wilson observed serious injuries on the child. She took Anthony up to every member of the household and he cried when presented to Williams and the Brydies' adult son, indicating Wilson suspected Anthony had been abused and had reason to narrow the range of possible abusers to Williams and another man in the household. When she returned from karaoke after leaving Anthony in Williams's care, Anthony had been severely injured again. Despite the child being unconscious and severely battered, she did not seek medical treatment until the following afternoon after she found him posturing in the morning. She then covered Anthony's injuries with makeup before taking him to the hospital. Based on this evidence, the jury could have readily concluded that Wilson knew Williams had been abusing Anthony and that, given the injuries Wilson observed over the course of the weeks prior to, and on the night of August 21st, a reasonable person would have known that Williams inflicted the fatal injuries. Consequently, by failing to secure prompt medical care, a reasonable person in Wilson's position would have known it was likely Anthony would die of the horrendous injuries Williams inflicted.

In sum, and viewing the instructions as a whole, we cannot conclude it was reasonably likely the jury applied the aiding and abetting and natural and probable consequences doctrine instructions in a way that violated the Constitution. Nor do we conclude that the application of the natural and probable consequences doctrine to criminally negligent child abuse was

invalid at the time of Wilson's trial.[3] Accordingly, we find no error in the instructions provided to the jury at Wilson's trial.

Wilson also urges us to impose a categorical bar on the use of the natural and probable consequences doctrine to criminally negligent child endangerment. As discussed below, the Legislature has since eliminated liability for murder based on the natural and probable consequences doctrine, rendering this argument moot.

B. Wilson Was Not Prejudiced by the Admission of Prior Acts of Child Neglect and Abuse

Before trial, the People sought to present evidence of Wilson's prior acts of child neglect as propensity evidence under Evidence Code section 1109, subdivision (a)(3), and to demonstrate motive, intent, deliberate plan and preparation, and lack of mistake under Evidence Code section 1101, subdivision (b). The evidence included two prior DCFS investigations regarding Wilson's neglect of Gracey, Anthony's older sister. Wilson argues that admission of these uncharged acts allowed the prosecution to argue that Wilson was guilty of murder by portraying her as an unfit mother.

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[3] As discussed below, applying an aiding and abetting theory based on the natural and probable consequences doctrine was rendered invalid by Senate Bill No. 1437, which took effect on January 1, 2019. At the time of Wilson's trial, however, the natural and probable consequences doctrine was valid.

The first incident involved an allegation from March 2011 when Gracey was approximately three months old. Gracey was running a fever and Wilson chose to leave her in Brydie's care while she went out to get a tattoo.[4] The fever worsened so Brydie took Gracey to the hospital. When Wilson did not return calls, Gracey's father and paternal grandmother went to the hospital to authorize her treatment. DCFS became involved and the dependency court substantiated an allegation of general neglect. DCFS closed the case in June 2012.

Shortly thereafter, DCFS received another report of child neglect. On June 14, 2012, a DCFS social worker found Wilson in a motel room with Gracey and Anthony's biological father. Wilson was pregnant with Anthony at the time. The room was filthy and unsanitary. Gracey was dirty, her diaper was soiled, and her hair was not combed. The People alleged Gracey was found drinking spoiled milk, had a severe diaper rash, and repeatedly fell off the bed. Gracey was immediately taken into protective custody. In February 2013, Wilson regained custody of Gracey; DCFS closed the case in January 2014.

Wilson objected to the introduction of these incidents, arguing that neither constituted "child abuse" within the meaning of Evidence Code section 1109, subdivision (a)(3). The statute refers the reader to section 273d for a definition of child abuse, which describes child abuse as willfully inflicting upon a child "any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition." (§273d, subd. (a); Evid. Code,

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[4] Wilson maintained that she did not get a tattoo, but was rather taking care of her sister's children. When Wilson's sister testified, she denied Wilson had taken care of her children on the night of Gracey's fever.

§1109, subd. (d)(2).) Wilson argued there was no evidence she inflicted an injury causing a traumatic condition in either incident. In addition, Wilson argued the evidence did not show motive or absence of mistake under Evidence Code section 1101, subdivision (b).

The People conceded the prior incidents did not fall within the definition of child abuse set forth in section 273d. However, although Wilson was not charged with domestic violence, the People argued the prior neglectful acts were nonetheless admissible because they fell within the definition of domestic violence in Evidence Code section 1109, subdivisions (a)(1) and (d)(3).

The trial court admitted the evidence, finding the prior incidents fell within the definition of domestic violence. The court also ruled the evidence of prior child neglect was admissible under Evidence Code section 1101, subdivision (b) to show motive and lack of mistake.

We review the court's rulings on the admissibility of evidence under Evidence Code sections 1109 and 1101 for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637; *People v. Johnson* (2010) 185 Cal.App.4th 520, 531.) For the reasons below, we conclude the trial court abused its discretion in allowing evidence of the March 2011 incident under Evidence Code section 1109, subdivision (a)(1), but the error was harmless. We also conclude the trial court did not abuse its discretion in admitting evidence of the June 2012 incident under Evidence Code section 1109, subdivision (a)(1). Because the error as to the first incident was harmless, and because we find no error in admitting evidence of the second incident, we need not address whether this evidence was also admissible under Evidence Code

section 1101, subdivision (b). (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1316.)

1. Statutory Definitions of Domestic Violence

Evidence Code section 1109, subdivision (a)(1) provides: "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."[5] Subdivision (d)(3) of the Evidence Code provides domestic violence "has the meaning set forth in Section 13700 of the Penal Code" and, if the act occurred no more than five years prior to the charged offense, domestic violence has the further meaning set forth in Family Code section 6211.

Section 13700, subdivision (b) defines domestic violence as abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. Section 13700, subdivision (a) defines abuse as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another."

Gracey is not a person described in section 13700, subdivision (b). However, Family Code section 6211 broadens the category of people upon whom abuse is considered domestic violence. It provides domestic violence is abuse perpetrated

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[5] Wilson does not argue on appeal that the evidence was inadmissible under Evidence Code section 352. We therefore do not address this issue.

against any of the persons listed above, and to "[a] cohabitant or former cohabitant, as defined in Section 6209" (Fam. Code, § 6211, subd. (b)),[6] "[a] child of a party" (Fam. Code § 6211, subd. (e)), or "[a]ny other person related by consanguinity or affinity within the second degree." (Fam. Code § 6211, subd. (f)) This would include Gracey if the prior incident occurred within five years of the prosecution. The challenged incidents occurred in March 2011 and June 2012, and Wilson was charged with murder and child abuse in 2015. Therefore, the definition of domestic violence in Family Code section 6211 applies. Wilson was charged with child abuse and the second degree murder of her son, both of which are criminal actions involving domestic violence within the meaning of Family Code section 6211.

On appeal, Wilson argues prior acts of domestic violence are not cross-admissible admissible in a child abuse prosecution. She reads section 1109 to mean that only prior acts of child abuse can be admitted in a prosecution for child abuse, and prior acts of domestic violence can only be admitted in a prosecution for domestic violence. Not so.

After analyzing the legislative history of section 1109, the Fourth District held in *People v. Dallas* that prior acts of domestic violence against a former girlfriend were cross-admissible in a child abuse prosecution. (*People v. Dallas* (2008) 165 Cal.App.4th 940, 957.) Wilson acknowledges the holding in *Dallas*, but argues it was wrongly decided and asks us to reject the reasoning of *Dallas*. In light of our analysis that child abuse and second degree murder are offenses "involving domestic

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[6] Family Code section 6209 defines "cohabitant" as "a person who regularly resides in the household."

violence" within the meaning of section 1109, subdivision (a)(1) and Family Code section 6211, we decline to take up Wilson's invitation to find *Dallas* was wrongly decided. The question remains whether Wilson's prior acts of neglect toward Gracey constituted the type of abuse contemplated in section 13700, subdivision (a). Did leaving Gracey with a caretaker in March 2011 when she had a fever so that Wilson could get a tattoo amount to recklessly "placing another person in reasonable apprehension of imminent serious bodily injury" within the meaning of section 13700, subdivision (a)? We conclude the answer is no. The error, however, is harmless because we conclude the conditions of the hotel room in June 2012 and Wilson's inaction when her child fell off a bed did place Gracey in "reasonable apprehension of imminent serious bodily injury." (§ 13700, subd. (a).)

2. The March 2011 Incident

As stated above, the March 2011 DCFS investigation arose after Wilson left Gracey in Brydie's care one day when Gracey had a 99 degree fever. The social worker investigating the incident testified Wilson agreed to have DCFS open a voluntary case, and Wilson was referred to parenting classes and a teen mom support group. When asked if Wilson was open to receiving these services, the social worker testified that Wilson told her it "sounded like fun." The case was then closed in June 2012.

We conclude leaving Gracey with Brydie when Gracey had a 99 degree fever does not amount to "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." (§ 13700, subd. (a).) Babies frequently get fevers and a temperature of 99 degrees,

without more, in no way places an infant in reasonable apprehension of imminent serious bodily injury. Accordingly, the trial court abused its discretion in allowing evidence of the March 2011 incident to be considered by the jury.

The error, however, was harmless. Reversal is only required when "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) The incident barely constitutes neglect, much less child abuse. As stated above, DCFS opened a "voluntary" case only and Gracey was not removed from Wilson's care. We therefore agree with the trial court that "[l]ots of kids have fevers. Lots of parents don't take them in. And honestly, my guess is a lot of jurors will look at this and say I have done the same thing many a time." Wilson was not prejudiced by the jury's consideration of the March 2011 incident. The error does not warrant reversal.

3. The June 2012 Incident

The social worker who conducted the initial investigation into the June 2012 incident testified she found Gracey, Wilson, and Wilson's boyfriend in a strongly malodorous motel room with garbage and other items spread across the room. The bed in which Gracey slept was soiled with "unidentified substances." Gracey was "filthy" and had a diaper rash. Gracey's baby bottle was dirty and contained a "thick substance." Gracey was active and moving around on the bed and on several occasions the social worker tried to prevent Gracey from falling. Wilson and her boyfriend did not react and eventually Gracey fell to the floor and hit her head. Gracey was immediately removed from Wilson.

We conclude the court did not abuse its discretion in allowing the jury to hear evidence of the June 2012 incident. Wilson exhibited no concern for Gracey's safety such that the social worker had to prevent Gracey from falling from the bed several times while Wilson stood by and failed to react. The court acted within its discretion in concluding that Wilson placed Gracey in "reasonable apprehension of imminent serious bodily injury." (§ 13700, subd. (a).)

Finally, even if the trial court erred in admitting the June 2012 incident under Evidence Code section 1109, it is Wilson's burden to show prejudice and she has failed to do so. (*People v. Gallardo* (2017) 18 Cal.App.5th 51, 76 [trial court's evidentiary rulings generally subject to harmless error review under *Watson* standard].) Two weeks before the fatal beating, Wilson observed bruises on Anthony's buttocks. He was listless and not using his left arm. Wilson allowed Anthony to suffer in this state for two weeks until the night she went to the karaoke bar with the Brydies.

When Wilson arrived home, Anthony was unconscious, yet Wilson did not call 911. Anthony had bruises on his head, face, back, abdomen, legs, buttocks, rectum, and scrotum. He whimpered when Wilson bathed him. He had a swollen lip and Williams had just revealed that he performed CPR on the child before Wilson returned home. Anthony was unconscious, his body severely beaten—yet Wilson did nothing. Only when she observed Anthony the next morning posturing—frozen in a seizure position with his back arched and his arms extended—did she decide to take him to the hospital. Even then, she covered his injuries with makeup and baby power to conceal the severe

bruising on his body and arrived at the hospital six hours after noticing his condition.

Appellant's prior neglect of Gracey pales in comparison to the facts of this case. We cannot conclude Wilson suffered any prejudice by the introduction of the June 2012 incident.

C. Recording of Williams' Confession

As stated above, Wilson participated in three interviews with Detective Velasquez at Palmdale Hospital. The first interview was conducted with Wilson alone. Thereafter, Velasquez interviewed Williams separately and brought Wilson in at the end to hear from Williams himself that he intentionally abused Anthony. The third interview with Wilson was conducted in the presence of Wilson's sisters and mother. The jury heard recordings of the first and third interviews, but not the second.

Wilson sought to introduce the recording of the portion of the second interview with both Williams and Wilson present as circumstantial evidence of Wilson's state of mind at the time of Williams's confession, and to give context to all of Wilson's statements that day under the rule of completeness. In other testimony, many statements were introduced through Wilson's family, law enforcement officials, and medical personnel suggesting Wilson knew Williams had been abusing Anthony and deliberately tried to cover for him. This evidence was offered to support the People's theory that Wilson aided and abetted murder. Wilson argued the jury should hear her emotional and angry reaction to Williams's confession to assess the credibility of her statements that she did not know about the abuse and thought Anthony only slipped and fell.

The court denied Wilson's request to introduce the recording as evidence of Wilson's state of mind. The court also declined to admit the recording under the rule of completeness because each of the interviews was a discrete and separate conversation. The court allowed Wilson to question Detective Velasquez about the second interview, but only to elicit testimony that Wilson heard "the truth . . . come out," and responded by crying and yelling.

On appeal, Wilson argues that her second degree murder conviction must be reversed because the court abused its discretion in finding the rule of completeness inapplicable. We disagree.

Evidence Code section 356 provides: "[w]here part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." Evidence Code section 356 is often referred to as the rule of completeness. (*See People v. Vines* (2011) 51 Cal.4th 830, 861.)

The purpose of the rule of completeness is to "prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed." (*People v. Arias* (1996) 13 Cal.4th 92, 156; *People v. Cornejo* (2016) 3 Cal.App.5th 36, 73.) " 'Thus, if a party's oral admissions have been introduced into evidence, he [or she] may show other portions of the *same interview or conversation*, even if they are self-serving, which "have some bearing upon, or

connection with, the admission." ' " (*Ibid*, italics added.) The rule of completeness contemplates allowing only an entire undivided statement, act, or declaration into evidence to cure any distortions that would otherwise mislead the jury. Section 356 is applicable only when necessary to make the already introduced conversation understood. It is not applicable to distinct, independent conversations that are " 'independently comprehensible' " on the relevant topic. (*People v. Farley* (2009) 46 Cal.4th 1053, 1103.)

Here, each of the interviews at the hospital was a separate conversation. Wilson attempts to characterize these distinct interviews as a scenario in which Velasquez "stopped her recording device at different points in the conversation." Not so. The interviews do not constitute one, ongoing conversation in which Velasquez stopped and started her recording device. Although they occurred close in time, each interview was conducted with different parties and the conversation with Williams took place in a different room than the others.

Moreover, excluding the recording did not allow the People to mislead the jury. The content of the first and third interviews were independently comprehensible; the second conversation with Williams was in no way necessary to make the first and third interviews understood. The People did not use selected parts of the interviews to mislead the jury on the issues of whether Williams confessed and whether Wilson reacted in anger. We therefore conclude the court acted within its discretion in excluding the recording of Williams's confession to Wilson and her reaction.

D. Wilson is Entitled to Petition for Relief Under Senate Bill No. 1437

Senate Bill No. 1437 eliminated liability for murder under the natural and probable consequences doctrine, one of the theories argued to the jury in this case. It was signed by the Governor on September 30, 2018 and became operative on January 1, 2019. Both parties agree Wilson is entitled to consideration for relief under the ameliorative amendments in Senate Bill No. 1437. We agree as well. Where they disagree is as to whether this court should do the analysis required under Senate Bill No. 1437 or whether the trial court should do it. For the reasons set forth below, we conclude that we are not the proper court to address whether Wilson is entitled to relief under Senate Bill No. 1437. Wilson must file a petition in the trial court under the provisions set out in Senate Bill No. 1437 to obtain the relief she seeks.

Senate Bill No. 1437 amended the felony murder rule and the natural and probable consequences doctrine, as it related to murder, "to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Sen. Bill No. 1437 (2017–2018 Reg. Sess.).) In pertinent part, Senate Bill No. 1437 created a process by which those convicted of murder under a felony murder or natural and probable consequences doctrine may petition the court for resentencing. (*Ibid.*)

A person convicted under a natural and probable consequences theory may be eligible for relief upon a showing that the person could not be convicted of first or second degree murder as the law stands today. (§ 1170.95, subd. (a)(3).) To

obtain relief, the defendant files a petition with the court that imposed the sentence. If the court determines the defendant has made a prima facie showing that he or she falls within the provisions of section 1170.95, the court must appoint counsel to represent the defendant and the prosecutor must file a response within 60 days of service. The defendant then has 30 days to file a reply. If the court determines that the defendant is entitled to relief, the court issues an order to show cause. (*Id.*, subd. (c).) The court then holds a hearing to determine whether to vacate the murder conviction and resentence the defendant on any remaining counts. (*Id.*, subd. (d)(1).) At the hearing, the prosecution bears the burden of proof to establish, beyond a reasonable doubt, that the defendant is ineligible for resentencing. Both the prosecutor and defendant may rely on the record of conviction "or offer new or additional evidence to meet their respective burdens." (*Id.*, subd. (d)(3).)

Here, the jury was given an instruction on the natural and probable consequences theory, in addition to instructions on aiding and abetting and implied malice. Although the record does not reflect the theory upon which the jury relied, it may well be that Wilson could not today be convicted of second degree murder. However, we are not the proper court to preside over a hearing of this nature. Should the People choose to introduce evidence outside the record of conviction, for example, only the superior court should take such evidence and make the necessary factual findings. Furthermore, the Legislature deliberately created a means by which those previously convicted under a felony murder or natural and probable consequences theory may obtain relief through a step-by-step process in a very specific

court: the court that previously sentenced the defendant convicted under either of these theories.[7]

Our colleagues in Division Five of the Second District recently denied a request by an appellant seeking the ameliorative benefits of Senate Bill No. 1437 on direct appeal, and we agree with their conclusion that whether a defendant is entitled to relief under Senate Bill No. 1437 "will be a question for the trial court in the first instance, if a section 1170.95 petition is filed." (*People v. Martinez* (2019) 31 Cal.App.5th 719, 730.) If Wilson intends to pursue relief under Senate Bill No. 1437, she must file her petition in the superior court in the first instance.

E. Wilson is Not Entitled to a Remand for a *Franklin* hearing

Wilson contends she is entitled to a limited remand under *Franklin* and section 3051 to ensure she has a meaningful opportunity to present relevant mitigating evidence for use in a future youthful offender parole hearing. Wilson further argues that should we deem the issue forfeited, she received ineffective assistance of counsel. We disagree with both contentions.

"A youthful offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger . . . at the time of his or her controlling offense." (§ 3051, subd. (a)(1).) "[T]he board, in reviewing a prisoner's suitability for parole . . . shall give great weight to the diminished

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[7] If the sentencing judge is not available, the presiding judge designates another judge to rule on the petition. (§ 1170.95, subd. (b)(1).)

culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).) Wilson was under the age of 25 at the time of her offense; she will therefore have a youthful offender parole hearing after she completes 15 years of her life sentence.

In *Franklin*, the defendant was 16 years old when he committed murder and the trial court was obligated by statute to sentence him to two consecutive sentences of 25 years to life. (*Franklin*, *supra*, 63 Cal.4th at p. 268.) The defendant was sentenced in 2011, prior to the enactment of Senate Bill No. 260 on January 1, 2014. (*Id.* at pp. 268, 276.) Our Supreme Court determined it was not clear if the defendant had sufficient opportunity at sentencing to "make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense" to enable the Board to "properly discharge its obligation to 'give great weight to' youth-related factors." (*Id.* at p. 284.) The Supreme Court therefore remanded the case to the trial court for a determination whether the defendant had an opportunity to make this record. (*Ibid.*)

Here, Wilson was 20 years old when she neglected Anthony and delayed taking him to the hospital. When she was sentenced on August 21, 2017, *Franklin* hearings had been available to all youthful offenders who were under the age of 23 at the time of

their offenses as of January 1, 2016.[8] (Former § 3051, effective January 1, 2016 to December 31, 2017.) Unlike the defendant in *Franklin*, who was sentenced before section 3051 was amended to provide youthful offenders with parole hearings, Wilson was sentenced one year and eight months after section 3051 was amended to encompass offenders who were her age at the time of their crimes. She was therefore entitled to a *Franklin* hearing. Although neither trial counsel nor the court mentioned a *Franklin* hearing at any time during trial or sentencing, Wilson has not demonstrated that she was precluded from conducting one. Wilson had ample opportunity to request a *Franklin* hearing, or to make a record of her youthful characteristics at sentencing. The fact that she did not avail herself of these opportunities is not a reasonable basis to conclude she was denied a sufficient opportunity to make a record of her youthful characteristics over the course of the trial and sentencing proceedings.

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[8] Enacted in January 14, 2014, Senate Bill No. 260 established that youthful offenders who were under the age of 18 at the time of their offenses would be eligible for youthful offender parole hearings after serving 15, 20, or 25 years, depending on the length of the original sentence imposed. (Former § 3051, effective January 1, 2014 to December 31, 2015.) Senate Bill No. 261, enacted on January 1, 2016, extended the age of eligibility to offenders under the age of 23. (Sen. Bill No. 261 (2015–2016 Reg. Sess.).)

Wilson further asserts "[t]o the extent [Wilson] was previously afforded an opportunity" to put mitigating evidence relating to her youth, but did not, she received ineffective assistance of counsel. Not so. We do not have enough information to determine trial counsel was ineffective by not requesting a *Franklin* hearing. Trial counsel may have made a strategic or tactical decision not to do so. She may have determined that information about Wilson's youthful characteristics would not be favorable to her at a youthful offender parole hearing. Trial counsel may have decided that the evidence of Wilson's educational challenges that was already adduced at trial was the only information that would assist Wilson. Wilson has not demonstrated otherwise; she merely asserts that "there could have been no reasonable tactical basis" for trial counsel to forfeit Wilson's right to a *Franklin* hearing. This is not enough to demonstrate Wilson received ineffective assistance of counsel.

We conclude Wilson forfeited her right to a *Franklin* hearing and has not proven she received ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

BIGELOW, P. J.

WILEY, J.